THE BORDERLAND OF LARCENY.

I.

THE common law crime of larceny differs from such a crime as homicide in that it shades off on every side into the region of mere tort. When one human being is killed by another, the question of crime depends solely upon the intent with which the act was committed. But when a man's property is wrongfully interfered with, the act is criminal only under certain conditions; and the line between such interference as is criminal and such as is a mere tort is purely arbitrary, being founded on no distinction in the nature of things. As a result, there is on all sides a debatable ground, where the act may conceivably be held a crime, or with equal inherent reason may not. The difficulty is not diminished by the fact that the borders of criminality have been extended by statutes, whereby such crimes have been created as embezzlement, cheating, cheating by false pretences, malicious mischief, forcible trespass, etc. The question still remains, whether the act is a crime by the common law or by statute. I purpose to discuss only a single aspect of this subject.

From the beginning, the common law has limited the crime of larceny to cases of wrongful taking from the possession of the owner without his consent. In some early authorities it was stated simply that the taking must be against the will of the owner (*invito domino*).[1] Glanville[2] states the rule more fully: "The party shall be absolutely excused from the imputation of theft by reason that his possession of the thing detained originated through the owner of the property." Staunforde elucidates the point with his usual care: "The intent must be at the time when he came into possession of the goods; for if he had the possession lawfully, although he should afterward with ill intent convert the goods to his own use, yet it is not felony. As, if I bail my goods to one, who converts them to his own use; as appears P. 13, E. 4, f. 9. But if an innkeeper puts a piece before one to drink from it, and he carries it off, it is felony, because he had not

[1] Bract. 150 b; Fleta, bk. i. c. 38; Mirror, c. i. § 10.

[2] Bk. x. c. 13.

the possession of it, only the use. The same is law of the butler or cook in my house, who have my plate or vessel to use, and they carry it off; it is felony, because the possession is always in me."[1]

Mr. Justice Stephen thinks that this rule was a limitation more or less consciously put upon a former broader principle of the common law in order to restrain the scope of larceny, while at the same time the scope of trespass was extended by the action of trover, the purpose being that the owner might have his goods again.[2] This, however, can hardly be. There is no evidence of a former broader principle, nor was it necessary; for the owner had always the option of suing civilly rather than criminally.[3] In truth, the limitation seems to have been inherent in the nature of a common law felony. That act alone was punishable by appeal or indictment which was done *contra pacem regis*, or, in other words, *vi et armis*.[4] Thus, in Rex *v.* Raven,[5] where one who had hired lodgings stole the furniture, it was agreed by Lord Bridgeman, Kelyng, J., and Wylde, Recorder of London, that it was no felony, "because she had a special property in them by her contract, and so there could be no trespass; and there can be no felony where there is no trespass, as it was resolved in the case of Holmes, who set fire on his own house in London, which was quenched before it went further."

It thus appears to have been a general rule of the common law that there is no felony without trespass. And if, as seems clear, the action of trespass is derived from the appeal of felony, the cause of this broad rule is apparent. When the rule is applied to the crime of larceny, it is evident that in those cases where trespass lies there may be larceny, but in cases where detinue or account lies there is no felony;[6] and therefore that when goods are delivered up by the owner there can be no larceny.

Starting from this point, it follows that the state of mind of the defendant at the time of taking is immaterial. If the owner gives over the possession voluntarily, the fact that he has been induced to do so by deceit of the other cannot alter the fact of delivery. There is no trespass, no *vi et armis*, and therefore no felony. The wrong is not a trespass, but a fraud. It is different where the

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[1] Staunf. Pl. Cor. fol. 25. [2] 3 Steph. Hist. Cr. L. 133.

[3] Bract. 150 b; Brit. fol. 49. See a note by Professor Ames, 3 H. L. R. 29; see also 3 H. L. R. 177.

[4] *Per* Brian, C. J., 13 Ed. 4, 9, pl. 5; 3 H. 7, 12, pl. 9.

[5] Kelyng, 24. [6] 21 H. 7, 14, pl. 21.

consent of the owner is extorted by force or fear. In that case the possession is not voluntarily parted with, and the wrong-doer is just as much guilty of trespass in taking the property as he would have been if the formal consent had not been given.[1]

The difficulty in the older cases was to determine what constituted a giving up of possession. The natural and obvious rule was generally laid down, that where the owner's chattel remained in his house or in his personal presence it continued to be in his possession. Thus in the Year Book, 21 H. 7, 14, pl. 21, Pigot (apprentice) put this case to Cutler, Serjeant: "If I deliver (*bail*) a bag of money to my servant to keep (*al gard*), and he flees and escapes from me with the bag, is it felony? *Cutler* said, Yes; for so long as he is in my house, or with me, whatever I have delivered to him is adjudged in my possession."[2] Staunforde used language to the same effect: "The thing stolen seems never to have been out of the owner's possession, because it had not passed outside his house."[3] So far was this notion carried that we find in good use the phrase, "outside the possession of the house."[4] In accordance with this view, a guest who, with felonious intent, carried goods from one room to another of an inn, was regarded as never having taken them from the innkeeper's possession,[5] and a servant or workman to whom were given goods to keep or to work upon, had no possession.[6] So a guest had no possession of the plate upon which his dinner was served.[7]

On the other hand, where goods were delivered to any one, servant or stranger, to carry away, the owner surrendered possession.[8] Thus, in the Year Book, 21 H. 7, 14, pl. 21, "*Cutler* said: If I deliver a horse to my servant to ride on a journey, and he absconds with it, it is not felony; for he came lawfully by the horse by delivery. And so it is if I give him a bag to carry to London, or to pay some one, or to buy something, and he absconds with it, it is not felony; for it is out of my possession, and he comes lawfully by it. *Pigot.* It may well be; for the master in all those cases has a good action against him, namely, Detinue, or Action of Account."[9] This rule prevailed until the end of the last century.[10]

The diversity was not acquiesced in by every one. It was some-

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1 Reg. *v.* Lovell, 8 Q. B. D. 185.
2 s. c. Bro. Abr. Coron. pl. 58.
3 Staunf. Pl. Cor. 26.
4 Bro. Abr. Coron. pl. 159.
5 Staunf. Pl. Cor. 26.
6 21 H. 7, 14, pl. 21; Kelyng, 35.
7 Bro. Abr. Coron. pl. 159.
8 13 Co. 69, and cases cited; Moore, 248, pl. 392.
9 s. c. Bro. Abr. Coron. pl. 58.
10 Watson's Case, 2 East P. C. 562.

times held that a servant, even while in his master's house, has possession; as, for instance, a butler of the plate in his charge.[1] To settle this conflict in the authorities the statute 21 H. 8, c. 7, was passed; it provided that when chattels are delivered to a servant by his master to keep, and the servant converts them, it shall be felony.[2] This statute was soon held not to apply to a delivery to a servant by a stranger outside the master's house.[3] And it never was held to cover the case of delivery to the servant to carry to a distance.[4] By the end of the last century, however, the reason for the diversity was lost sight of; and it was held that where the servant had goods from the master, although it were to carry to a distance, the possession remained in the master.[5] This decision, though opposed to the former authorities, and unsupported on principle, has been followed, and is now law.

The old conception of possession, according to which the master has possession of all chattels in his house or presence, still survives in an analogous case. When the master sends a servant to get goods from a stranger in a cart, boat, or other vehicle in the master's possession, the goods come into the master's possession as soon as they are put into the vehicle; and if the servant afterwards takes them out *animo furandi*, he is guilty of larceny.[6] But the rule has broken down where it should have been strongest. When a stranger gave goods to a servant for his master in the master's house, the goods would clearly, according to the old notion of possession, have been held to be at once in the master's possession.[7] But at the end of the last century it was finally determined that in such a case the servant got possession. The case was that of a bank teller, who upon receiving money for the bank, put it in his

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[1] *Brian* [C. J.]. It cannot be felony, because he could not take *vi et armis*, because he had charge of it. And the Justices were of the same opinion. — 3 H. 7, 12, pl. 9.

[2] It has been supposed by some that the "doubt" stated in the preamble was upon another point; namely, whether the servant sent to a distance with goods had possession. But there seems to be no authority in the books clearly opposed to that proposition, which indeed, upon the notion of possession then prevailing, was obvious. On the other hand, the then recent case just cited certainly left doubtful the nature of a servant's relation to the master's chattels of which he had charge in the master's house; and that must have been the doubt referred to. This opinion is confirmed by the language of the statute, which applies only to a delivery to a servant *to keep*.

[3] Dyer, 5.

[4] Watson's Case, 2 East P. C. 562.

[5] Lavender's Case, 2 East P. C. 566 (1793).

[6] Reg. *v.* Reed, 23 L. J. N. S. M. C. 25; Rex *v.* Spears, Leach C. C. (4th ed.) 825.

[7] See the opinion of Holmes, J., in Com. *v.* Ryan, 30 N. E. Rep. 364 (Mass.).

own pocket; and it was held not to be larceny.[1] This decision was the cause of passing the statute 39 Geo. 3, c. 85, which created the crime of embezzlement. The statute applied only to a taking by a clerk or servant; but it has been extended by later statutes so as to cover most, if not all, cases of taking by bailee or other mere possessor. It is still sometimes difficult to distinguish the crimes; for instance, just what dealing with goods by a servant is enough to give the master possession has been the subject of much argument.[2] But upon the whole, the boundary between larceny and embezzlement is now clearly established, whatever may be our view as to the correctness of it.

II.

Let us now return to the general principle with which we began, that there can be no larceny if there was a delivery by the owner. I have stated it to be incontestable that no matter what motive operated on the owner's mind to induce the delivery, if there was in fact a voluntary parting with possession, there should be no larceny.

There is little trace of any other theory until the end of the last century,—a period marked by gross misconception in other respects of the true nature of larceny. In 1779 a different rule was established by the decision in Pear's Case.[3] In that case it appeared that the defendant hired a horse under pretence of taking a journey, but at once sold and delivered it to a stranger; such having been his intention from the beginning. The court held this to be felony, in spite of delivery by the owner; for the original intent having been fraudulent, "the parting with the *property*[4] had not changed the nature of the *possession*, but that it remained unaltered in the prosecutor at the time of the conversion." That this decision was a novelty, and an unwarranted modification of the law of larceny, appears upon an examination of the authorities cited by the court.

One of the authorities cited as sustaining the decision was a case in Sir Thomas Raymond's Reports.[5] The defendant "cheapened" goods in a shop; the shopkeeper handed him some of the

[1] Bazeley's Case, Leach C. C. (4th ed.) 835. Eyre, C. J., "observed that the cases ran into each other very much, and were hardly to be distinguished."

[2] See Com. *v.* Ryan, 30 N. E. Rep. 364 (Mass.).

[3] 2 East P. C. 685; 1 Leach (4th ed.) 212.

[4] That is, right of possession, — a sense in which the word was then much used.

[5] Rex *v.* Chissers, T. Raym. 275. See also the case put in Kelyng, 82.

goods, and he thereupon ran away with them. Nothing could be plainer than this case. The defendant was not given possession of the goods; he was allowed to take them in the owner's presence, and they continued in the owner's possession. That the owner in such a case continues in possession is settled by many decisions;[1] and the case is therefore no authority for the decision in Pear's Case. This fact was pointed out by East, who adds that it "was mentioned by some of the judges on the conference as a matter proper for consideration, whether cases of that description were not governed by the principle that the legal possession still remained in the owner of the goods notwithstanding the delivery, he continuing present?[2] though others thought that too refined, as setting up a legal fiction against the fact, which ought never to be done in criminal cases."[3]

Another authority cited by the court is the puzzling passage in Littleton:[4] "If tenant at will commit voluntary waste, as in pulling down of houses, or in felling of trees, it is said that the lessor shall have thereof against him action of trespass; as if I deliver to one my sheep to dung his land, or my oxen to ear his land, and he slayeth my beasts, I may well have an action of trespass against him, notwithstanding the delivery." This dictum as to the animals is unquestionably opposed to the law as I have stated it, and can be explained only as a nod of Homer, an example of the then prevailing confusion between trespass *vi et armis* and trespass on case; but it affords no comfort to the court which cited it. For it applies not to a case where the *animus furandi* existed at the time of the delivery, but to a case where the intent was formed after the bailment had come into existence. In other words, if it were followed, it would not support the doctrine of larceny by trick, but it would abolish the distinction between larceny and embezzlement, — a result far from that intended by the court in Pear's Case.

A third authority was Tunnard's Case,[5] decided in 1729. In that case it appeared that the defendant hired a horse to ride three miles; but having gone that distance, he rode away to London and sold the horse. The case was tried before Lord Raymond, C. J.,

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[1] 2 East P. C. 683; Regina *v.* Johnson, 5 Cox C. C. 372; Com. *v.* O'Malley, 97 Mass. 585; State *v.* Hall, 76 Ia. 85; People *v.* Johnson, 91 Cal. 265.

[2] It appears by East's note that Skynner, C. B., was of this opinion.

[3] 2 East P. C. 683.

[4] Tenures, § 71. The translation is that of Tomlins's edition.

[5] 2 East P. C. 694.

Denton, J., and Hale, B.; and they agreed that it was felony, "because the privity was determined after he had ridden further than the agreement warranted: but if there had been no such agreement, the privity would have remained, and the riding away would have been no felony; and the C. J. who tried him having left it to the jury to consider, Whether the prisoner rode away with the horse with intent to steal it, they found him guilty."

This case supports the decision in Pear's Case no better than the citation from Littleton. The court which decided Pear's Case seems to have thought that the jury in Tunnard's Case were charged to find the intent at the time of hiring. This is, however, a misapprehension. The intent which the jury found was that with which the defendant "rode away;" that is, rode toward London, after having completed the journey for which the horse was hired. If there had been no such agreement, according to the opinion of the court, "the privity would have remained; that is, if the horse had been hired for a term, and sold, it would not have been felony; and there is no intimation that a felonious intent at the time of hiring would have been material. The decision is an application of the rule established, or supposed at that time to have been established, by the Carrier's Case, the only other authority cited by the court.

We must therefore proceed to consider the Carrier's Case,[1] the root of the whole difficulty. There it appeared that one bargained with another to carry certain bales with, etc., to Southampton, and he took them and carried them to another place, and broke up the bales and took the goods contained therein feloniously, and converted them to his proper use, and disposed of them suspiciously. Only four judges are reported as expressing their opinions in this case. Lord Chancellor Booth in the Star Chamber, and Needham, J., in the Exchequer Chamber thought that there might be larceny, even by one in possession, if the intent to steal existed at the time of conversion. "Felony is according to the intent, and his intent may be felonious as well here as if he had not the possession." Choke, J., held that the bales only, and not their contents, were delivered; and therefore that a taking of the contents was a taking from the owner's possession. Brian, C. J., held in both courts that there could be no larceny where (as here) there had been a delivery.[2]

[1] 13 Ed. 4, 9, pl. 5; translation of Pollock and Wright, Poss., 134; Chap. Cas. 296.

[2] The same difference of opinion between Choke and Brian had been shown before; *e. g.*, 12 Ed. 4, 8.

The opinion of the Lord Chancellor and Needham, J., if ever seriously held, had ceased to have influence before the time of Queen Mary.[1] That of Choke, J., though it rested upon a rule then well established,[2] seems hardly justified by the facts. It may well be that when a chest is delivered, there is no delivery of the goods within the chest; but this can be true only if the chest is an article of sufficient importance in itself to be the subject of delivery. One cannot say as a matter of fact that bagging in which a bale of goods is wrapped, or paper about a parcel, or twine with which a bundle of clothes is tied, is delivered, while the goods thereby inclosed are not delivered; and these bales appear to have been of that sort. The view of Choke, J., seems, however, now to be the prevailing one, and to have been carried to extreme lengths.[3]

If there was a delivery by the owner, the opinion of Brian, C. J., is the only one that can be supported on principle; but one may perhaps conjecture that the facts were otherwise. Some of the counsel for the prosecution argued as if, the bargain for carriage having been made, the defendant himself took the bales (without delivery by the owner) under pretence of carrying out the bargain, but with felonious intent, and at once converted them.[4] And this seems to be the view of Staunforde.[5] If these were the facts, it might well be called felony.

One thing, however, is certain, that a view of the Carrier's Case prevailed for two centuries which differed from those I have stated. From the time of Coke[6] to that of East, almost every jurist agreed upon the view well stated by the latter:[7] "There are some tortious acts before the regular completion of a contract, on which goods are delivered, which may determine the privity of it, and amount in law to a new taking from the possession of the owner. This principle furnishes the well-known distinction in the Carrier's Case, which seems to stand more upon positive law, not now to be questioned, than upon sound reasoning." As I have said, Tunnard's Case was an application of this principle.

During all the time from Coke to Pear's Case I have found but one opinion opposed to the prevailing view just stated; and it

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[1] Staunf. Pl. Cor. 26. [2] Chap. Cas. 299, note.

[3] Com. *v.* James, 1 Pick. 375; Reg. *v.* Poyser, 2 Den. C. C. 233.

[4] See the language of Vavisour and Laicon, *arguendo.*

[5] "If I bargain with another to carry certain bales to a certain place, and he takes them, and carries to another place, . . . it will be felony." Pl. Cor. 25.

[6] 4th Inst. 107. [7] 2 East P. C. 695

may have been that of Kelyng, J. As this opinion seems to be the only one known to the court which decided Pear's Case, it may be well to consider just the value to be given it.

Kelyng, J., with Lord Bridgeman and Recorder Wylde, had correctly decided that where the hirer of furnished lodgings ran away during the term with part of the furniture, the act was not felony.[1] No other decision was possible, on principle or on authority.

At the time Kelyng's Reports were in preparation, almost a generation after his death, a stray manuscript came to the editor, and was introduced into the reports, prefaced by this note: "This is not found in the original manuscript, but may be fit to be reported because said to come from Mr. Serjeant Kelyng, son to the Chief Justice."[2] The manuscript seems to be a memorandum of the judge, in which he deems it to be worthy of consideration whether the taking in Raven's Case was not felony, on the principle involved in the Carrier's Case; and he states that principle to be that "his subsequent act of carrying the goods to another place, and there opening of them, and disposing of them to his own use, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them.[3] But," he adds, "I marvel at the case put,[4] 13 E. 4, 9 b, That if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it but sell it, all this is no felony; but if he draw part of it out above the value of twelve pence, this is felony. I do not see why the disposing of the whole should not be felony also." This marvel is not marvellous; for the diversity is one which could not exist if the idea of the Carrier's Case expressed in this manuscript were the true one.

If the manuscript was indeed written by Kelyng, it was a hasty opinion which he did not, upon consideration, think fit to annex to his report of Raven's Case, and is very slender authority with which to support so novel a decision as that in Pear's Case. But not only was the effect of the authorities misconceived by the court, its reasoning was lamentably weak. The majority of the court argued that if there was no *bona fide* contract, — that is, if the understanding of the parties was not the same, — the contract was a mere pretence, and the case was the same as if the horse had been taken without any agreement. But this is shallow sophistry. The

[1] 1 Raven's Case, Kel. 24. [2] Kel. 81.

[3] This notion is founded on the argument of Vavisour in the Carrier's Case.

[4] By Choke, J.

parties were *ad idem;* there was no mistake at all as to the terms of the contract. But even if the contract had been absolutely void, the owner voluntarily gave up the manual possession and the power of control to the defendant, and therefore there was not the trespass *vi et armis* which is essential to a common law felony.

It is too late, however, to quarrel with the decision in Pear's Case. It was followed within a few years by a number of cases;[1] and its doctrine, under the name of "larceny by trick," is a most vigorous one to-day.

III.

The decision in Pear's Case was not merely contrary to authority; it was not carried to its logical conclusion by subsequent cases. If the contract, being fraudulent in its inception, was not to be considered in Pear's Case, it should equally be disregarded if it had attempted to bestow the property as well as the possession on the defendant. If fraud can supply the place of force, it must be as powerful in the one case as in the other. And it would seem that the court meant to carry its rule to the extreme, and thus render useless the statutes which punished the obtaining of goods by false tokens[2] and by false pretences.[3] The majority did, indeed, notice those statutes, and held that they were "confined to cases where credit was obtained in the name of a third person, and did not extend to cases where a man, on his own account, got goods with an intention to steal them."[4] But surely that sort of fraud would to-day constitute larceny by trick, and in fact the majority seemed so to realize; for they thought on the whole that the two statutes named were passed to give facility in punishing cases already felony by the common law. Eyre, B., alone suggested the distinction between obtaining mere possession and obtaining title. His distinction was, however, adopted with enthusiasm, and continues to be stated as law to-day; and Lord Coleridge said in the latest case[5] that "all the cases, with the possible exception of Rex *v.* Harvey,[6] as to which there may be some slight doubt, are not only consistent with, but are illustrations of, the principle, which is shortly this:

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[1] Rex *v.* Charlewood, 2 East P. C. 689; Rex *v.* Semple, Ib. 691; Rex *v.* Patch, Ib. 678; Rex *v.* Moore, Ib. 679.

[2] 33 H. 8, c. 1.

[3] 30 Geo. 2, c. 24.

[4] 2 East P. C. 689.

[5] Queen *v.* Russett, [1892] 2 Q. B. 312, 314.

[6] 1 Leach, 467.

If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud, — that is larceny." And Pollock, B., added, "that where the prosecutor has intentionally parted with the property in his money or goods, as well as with their possession, there can be no larceny."

Yet beautifully neat as this distinction is, it is defective on both sides; for there are instances of false pretences where the title does not pass to the defendant, and instances of larceny where it does pass; and in cases where these points are decided, the courts often protest the loudest that they are following Baron Eyre's rule. There are even some acts, apparently, which are both larceny and obtaining by false pretences.

It is well established that where the owner of goods, induced by fraud, intends to part with title to the goods, the defrauding party is guilty of obtaining by false pretences, though the title in fact may not pass. The common case is that of false personation. A, pretending to be a servant of C, and to come from her, borrowed a sum of money from B and made off with it. B intended the money for C, and A got no title, yet he was held guilty of obtaining by false pretences.[1] It was also held no felony; but recent cases have overruled this part of the decision. A sent a boy to a pay table to ask for the wages of B, a fellow-workman; this was held an obtaining by false pretences, though clearly no title passed to A.[2] A secured property by falsely pretending to buy for an undisclosed principal; he was held guilty of obtaining by false pretences.[3]

In Regina *v.* Middleton,[4] Cleasby, B., admitting that the law was in accordance with these decisions, argued that though these were cases of false pretences, they were not cases of larceny. The decision of that case, however, established the fact that larceny is committed under such circumstances.

On the other side, too, the rule has been broken in upon, and certain acts have been held larceny, though title passed. The court in such cases always protests that the title did not pass; but that seems to be an error. The process by which the result

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[1] Coleman's Case, 2 East P. C. 672; Leach (4th ed.), 303 *n.*

[2] Reg. *v.* Butcher, 8 Cox C. C. 77. See *acc.* Rex *v.* Adams, Russ. & Ry. 225; People *v.* Johnson, 12 Johns. 292.

[3] Com. *v.* Jeffries, 7 Allen 548.

[4] L. R. 2 C. C. 48, 68.

has been reached was a gradual one;[1] it will however be enough for our purpose to consider the case in which the final step is taken.[2]

It was an indictment for larceny of £8 at a fair. The defendant offered to sell A a horse for £23, £8 down, and the remainder either as soon as he could borrow it at the fair, or if he was unable to borrow it, at his house, to which defendant was to take the horse. A receipt was given, to the effect that defendant sold A a horse for £23, of which £8 was paid, leaving a balance of £15 to be paid on delivery. A testified that he never expected to get back his £8. Defendant never delivered the horse. The jury were charged that if he never intended to deliver the horse, but had gone through the form of a bargain as a device to obtain A's money, and A never would have parted with his £8 had he known what was in the prisoner's mind, they should find the prisoner was guilty of larceny. The jury found a verdict of guilty, and the case was stated for the Court of Criminal Appeal, the question being whether the charge to the jury was correct.

Counsel for the prosecution was not called upon; the point was regarded as too clear for argument, and the charge below was unanimously sustained. All the judges held that the title did not pass, that there was no contract, and no intention to give up the money except by way of deposit. A. L. Smith, J., said: "I need only refer to the contract, which provides for payment of the balance on delivery of the horse, to show how impossible it is to read into it an agreement to pay the £8 to the prisoner whether he gave delivery of the horse or not; it was clearly only a deposit by way of part payment of the price of the horse, and there was ample evidence that the prosecutor never intended to part with the property in the money when he gave it into the prisoner's possession." This was evidently an ordinary case of part payment in advance of performance. What "ample evidence" Mr. Justice Smith had in his mind is not apparent at this distance. On the contrary, both the form of the receipt and the prosecutor's own testimony show that the money was given the defendant to keep, and that the prosecutor deemed himself hardly treated, not because he did not

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[1] Compare Coleman's Case, Leach (4th ed.), 303 *n.*; Rex *v.* Nicholson, Ib. 610; Atkinson's Case, Ib. 1066 *n.*; Reg. *v.* Prince, L. R. 1 C. C. 150; Reg *v.* Solomons, 17 Cox C. C. 93; with Reg. *v.* Middleton, L. R. 2 C. C. 38; Reg. *v.* Buckmaster, 16 Cox C. C. 339.

[2] Queen *v.* Russett, [1892] 2 Q. B. 312; see also People *v.* Rae, 66 Cal. 423.

get back his £8, but because he did not get his horse. The case seems, in fact, to have established the doctrine that title does not pass, in case of a contract performable in instalments, until the whole contract on both sides is performed,— a most extraordinary doctrine, from every point of view. The best that can be said of such a decision is that it is a *reductio ad absurdum* of the rule in Pear's Case.

There seems now to be no stopping-point, at least in England. Wherever property is obtained by fraud, the jury may find, in the language of the charge here approved, that the owner "never would have parted with [the property] had he known what was in the prisoner's mind." Larceny has conquered the whole domain of false pretences. There is no longer any borderland between larceny and false pretences, for everything in that direction is larceny.

Joseph H. Beale, Jr.